UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket No. EL00-95-087**
	)	
Sellers of Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange,	)	
	)	
Respondents.	)	
	)	
	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	**Docket No. EL00-98-074**

RESPONSE OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO REQUESTS FOR CLARIFICATION OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER AND SEMPRA ENERGY TRADING CORP.

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), the California Independent System Operator Corporation ("California ISO" or "ISO")[1] replies to pleadings filed in this proceeding by the Los Angeles Department of Water and Power ("LADWP") and Sempra Energy Trading Corporation ("Sempra") on May 24, 2004.[2] Both of these pleadings address the issue, as discussed in the Commission's May 12 Order on Requests for Rehearing and Clarification in this proceeding, 107 FERC ¶ 61,165 (2004) ("May 12 Order"), of whether transactions entered into between certain entities and the ISO during the period October

[1] Capitalized terms not otherwise defined herein are used in the sense given in the Master Definitions Supplement, Appendix A to the ISO Tariff.

2, 2000 through June 20, 2001 (the "Refund Period") are properly treated as "Out of Market" transactions for purposes of price mitigation.

I. BACKGROUND

In the May 12 Order, the Commission revisited the issue of whether it has authority to mitigate the prices of transactions entered into between Grant County and the ISO during the Refund Period. The Commission stated that the key issue in answering this question is "whether particular sales could only be made pursuant to the CAISO Tariff." May 12 Order at P 83. The Commission explained that although its earlier orders in this proceeding had focused on transactions made in the organized ISO and California Power Exchange ("PX") markets, the ISO also entered into OOM transactions, "short-term energy purchases necessary to maintain the reliability of the CAISO-controlled grid." *Id*. at P 84. Because OOM transactions were authorized by the Commission and operated according to Commission rules, the Commission found that "such transactions, involving governmental entities, like spot market transactions involving governmental entities, fall under the Commission's jurisdiction." *Id*. at P 84. The Commission stated that, on rehearing, it now recognized that the "unique circumstances" cited by Grant County do not, in themselves, control the jurisdictional question. Instead, even if those factors were present, the Commission would have jurisdiction over any OOM transactions entered into by Grant County (or other governmental entities), "because those entities knew or should have known that such transactions were governed by the FERC-approved CAISO Tariff." *Id*. at P 85.

---

[2] Although the Commission did not indicate that it would allow reply briefs, the ISO is permitted to respond to LADWP and Sempra's pleadings, which are not limited to addressing Grant County and Turlock's transactions, pursuant to Rule 213.

Because Grant County and Turlock both maintained that they had submitted evidence that demonstrated that their transactions with the ISO during the Refund Period do not meet the Commission's definition of OOM transactions, but that this evidence was stricken, the Commission concluded that it would reopen the record to evaluate whether the stricken evidence supports Grant County and Turlock's assertion that their transactions with the ISO were not OOM transactions." *Id*. at P 86. The Commission directed the parties to submit briefs, not to exceed 20 pages, addressing this issue within 10 days of the issuance of the May 12 Order.

On May 24, 2003, several parties filed pleadings addressing this issue, including the ISO. This answer responds to several points raised in two of those pleadings. Specifically, LADWP's "Brief and Request for Clarification," and Sempra's "Motion for Clarification of May 12 Order, Admission into Evidence Offer of Proof, and Determination of Status of Non-OOM Bilateral Sales to the ISO."

II. ANSWER

A. The Commission Has Not Defined "OOM" as Limited to Dispatches of Participating Generators Pursuant to Section 5.6.2 of the ISO Tariff

In the ISO's May 24 brief on this issue ("ISO Brief"), the ISO explained that during the Refund Period, it entered into several types of transactions with suppliers, all of which were made pursuant to the ISO Tariff. Some of these transactions were made outside of its formal markets for Energy and Ancillary Services. Specifically, the ISO dispatched Participating Generators during periods of actual or threatened System Emergency pursuant to its authority set forth in Section 5.6.2 of the ISO Tariff. The ISO also procured energy from entities that were not bound by a Participating Generator

Agreement ("PGA") pursuant to ISO Tariff Section 2.3.5.1.5, which permits the ISO to "take such steps as it considers to be necessary to ensure compliance [with Applicable Reliability Criteria], including the negotiation of contracts through processes other than competitive solicitations."

In their pleadings, both LADWP and Sempra argue that "OOM" is a "term of art" meaning only the dispatches of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff. They attempt to support this cramped and self-serving definition by reference to Commission orders in other proceedings that discuss OOM transactions in the context of the ISO's dispatch of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff, contending that these Commission orders stand for the proposition that the term OOM *only* refers to the dispatch of Participating Generators. Although the cases cited by LADWP and Sempra only discussed this one particular type of OOM, in none of them did the Commission state that the term "OOM" was limited to dispatches of Participating Generators, and excluded other types of transactions made outside of the ISO's formal markets for Energy and Ancillary Services. It is understandable, and unremarkable, that, in addressing issues relating solely to the dispatch of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff, the Commission did not discuss the other type or types of OOM that is authorized under the ISO Tariff (*i.e.*, transactions made pursuant to Section 2.3.5.1.5). The very nature of the term "OOM" is general. It simply specifies a transaction "out of market," that is, outside the formal markets for Energy and Ancillary Services operated by the ISO.

LADWP and Sempra's argument is undermined by the fact that the Commission, in other contexts, has used the term OOM in a manner *not* limited to the dispatch of Participating Generators under Section 5.6.2 of the ISO Tariff. For instance, in its order

instituting numerous show cause proceedings against entities for activities that violated the ISO Tariff's prohibition against gaming and anomalous market behavior,[3] the Commission used the term "out-of-market" to refer to power "imported" and sold to the ISO on the return leg of a False Import transaction. The Commission explained that the reason for engaging in False Import transactions was to "take advantage of the fact that the ISO was making *out-of-market purchases* that were not subject to the price cap during real time whenever there was insufficient supply bid into its market." *Id*. at P 38. Clearly, in referring to "out-of-market purchases" in this context, the Commission did not mean the dispatch of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff. Dispatches of Participating Generators do not fit the paradigm of False Import transactions, for they are not imports (nor could they be disguised as such). Even more telling is the fact that the Commission, in the same order, broadly defined "out-of-market purchases" as "*all generation purchased by the ISO that was not bid into the market* or was bid at a price above the effective price cap." *Id*. at P 37, n. 53 (emphasis added). This broad definition captures transactions the ISO transacted with entities such as LADWP and Sempra, pursuant to Section 2.3.5.1.5 of the ISO Tariff.[4]

In its May 24 brief, the ISO pointed out that any argument along the lines made here by Sempra and LADWP was, in any case, a red herring. What matters is not the way in which the term OOM has been used in various other contexts, but what the Commission meant when it referred to OOM transactions *in this proceeding*, and whether the transactions at issue meet this definition. Despite numerous discussions in

[3] 103 FERC ¶ 61,345 (2003).

[4] Also, both LADWP and Sempra were ISO Scheduling Coordinators during the Refund Period. It is unreasonable and unconvincing for either of these entities to maintain that their transactions with the ISO were made outside of the auspices of the ISO Tariff, or are beyond the Commission's jurisdiction to mitigate in this proceeding.

the Commission's orders in this proceeding that demonstrate that the Commission did not intend for OOM to be limited to the dispatch of Participating Generators,[5] Sempra argues that the Commission's rationale for mitigating OOM transactions in this proceeding suggests the contrary. Specifically, Sempra states that the Commission's rationale for making OOM transactions subject to mitigation was based on a finding that "the specific circumstances of OOM sales makes them no different than sales in the centralized markets," but contends that Sempra's sales do not meet this definition because, unlike OOM sales which are made after the close of the Hour-Ahead Market, Sempra's transactions with the ISO were entered into prior to the close of the ISO's Hour Ahead Market. Sempra at 9-10.

This argument is flawed. First, it relies on a mischaracterization of the Commission's rationale for mitigating OOM transactions. The Commission's exact statement in the July 25 Order was: "To the extent the ISO made spot market OOM purchases . . . such purchases are no different than purchases through its markets. Both types of purchases are made by the ISO *in order to procure the resources necessary to reliably operate the grid*." (emphasis added). 96 FERC ¶ 61,120 (2001) at 61,515. The timing of these transactions is irrelevant, because the Commission made absolutely no mention of timing as a factor in its decision to mitigate OOM transactions. Instead, the Commission focused on the fact that OOM transactions, similar to purchases made through the ISO's formal markets, were made in order to "procure the resources necessary to reliably operate the grid." In testimony submitted in this proceeding, the ISO explained that the transactions it entered into with suppliers such

[5] ISO Brief at 10-12.

as Sempra pursuant to Section 2.3.5.1.5 of the ISO Tariff were made for this exact purpose. Exh. ISO-37 at 88:18-89:20.

Indeed, the mere fact that Sempra is claiming that its transactions should be exempted from mitigation because they are not "OOM transactions" highlights the ridiculousness of this entire argument. As the Commission is well aware, the shortage of energy, and the reluctance of many suppliers to bid into the ISO's formal markets for Energy and Ancillary Services during this period compelled the ISO to make numerous purchases outside of those formal markets with various load-serving entities, such as LADWP, and marketers, such as Sempra. All of these purchases were made pursuant to Section 2.3.5.1.5 of the ISO Tariff. Although some of the entities that transacted with the ISO during the Refund Period under Section 2.3.5.1.5, such as LADWP and Turlock, are not public utilities, as defined in the Federal Power Act, many, including Sempra, are. Therefore, regardless of how the Commission rules on the issue of jurisdiction over sales made by non-public utilities to the ISO, it is clear that all of the wholesale sales of energy made by these public utilities are FERC-jurisdictional, whether they were made via the ISO's formal markets for Energy and Ancillary Services or provided directly to the ISO pursuant to the ISO's contracting authority set forth in Section 2.3.5.1.5 of the ISO Tariff.

However, if Sempra's argument were to prevail, all of these OOM purchases from all of these entities, *including those made by public utilities such as Sempra*, would presumably be exempt from refund liability, because the only transactions still subject to mitigation would be those that bid into the ISO's formal markets and the dispatches of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff. Such a drastically

limited scope of mitigation was clearly not contemplated or intended by the Commission.[6]

As the Commission made clear in the July 25 Order, OOM transactions were to be subject to mitigation to the same degree as transactions made through the ISO's formal markets because both types of purchases were made by the ISO "in order to procure the resources necessary to reliably operate the grid." July 25 Order at 61,515. Resources procured from suppliers pursuant to Section 2.3.5.1.5 were no less made "in order to procure the resources necessary to reliably operate the grid" than energy obtained through the ISO's formal markets and pursuant to the ISO's authority to dispatch Participating Generators. If anything, the ISO's purchases made pursuant to Section 2.3.5.1.5 were of an even more urgent nature than other types of transactions. The ISO always preferred to maintain reliability via bids made into its formal markets for Energy and Ancillary Services, and, if necessary, through the dispatch of Participating Generators pursuant to Section 5.6.2 of the ISO Tariff. Transactions made pursuant to Section 2.3.5.1.5, the terms of which were generally established through ad-hoc telephone communication, represented the ISO's last ditch attempts to procure the energy that would make the difference between keeping the lights on in California and instituting rolling blackouts. The Commission recognized this when it noted, in the July 25 Order, that the ability of suppliers to demand unjust and unreasonable rates is amplified with respect to OOM transactions because suppliers know that the ISO is in a must-buy situation. *Id*. Given the Commission's rationale for mitigating OOM

[6] *See e.g.*, ISO Brief at 10-11 (noting that the Commission, in its December 19 order in this proceeding, considered the rehearing petitions of several non-PGA suppliers with respect to the issue of whether OOM transactions should be mitigated, and pointing out the fact that there would have been no reason for the Commission to have considered these rehearing requests if it had intended refund liability to apply only to those OOM transactions with Participating Generators).

transactions, it makes absolutely no sense whatever that the Commission intended that the numerous transactions entered into by the ISO pursuant to Section 2.3.5.1.5 of the ISO Tariff during the Refund Period, with various suppliers, both public and governmental, would go unmitigated.

B. Sales Between the ISO and Non-SC Sellers Such as LADWP and Sempra Were Made Pursuant to the ISO Tariff

In the May 12 Order, the Commission stated that the key issue of whether particular sales by governmental entities fall under FERC jurisdiction is whether those sales "could only be made pursuant to the CAISO Tariff." May 12 Order at P 83. LADWP argues that none of the ISO's transactions with Grant County and Turlock during the Refund Period (and, by implication, those with LADWP as well) "could only be made pursuant to the ISO Tariff" because neither Grant County nor Turlock were Participating Generators or had any obligation to sell to the ISO. LADWP at 8. However, as the ISO pointed out in its brief, and LADWP acknowledges, the transactions made between the ISO and Grant County and Turlock *were* made pursuant to the ISO Tariff, specifically Section 2.3.5.1.5. That fact that certain suppliers were not Participating Generators and were not obligated to sell to the ISO is irrelevant to the question of whether those entities were transacting pursuant to the ISO Tariff. As the ISO explained in its brief, the ISO has no authority to acquire energy outside of the means set forth in its tariff.

LADWP also suggests that none of these transactions "could only be made pursuant to the ISO Tariff" because "nothing in the ISO Tariff governed the terms of these sales." LADWP at 8. This is a non-sequitur. Section 2.3.5.1.5 states that the ISO has, under certain circumstances, the authority to procure energy through the

"negotiation of contracts through processes other than competitive solicitations." Because the Tariff does not spell out the exact price, quantity, and terms of delivery for transactions made pursuant to this Section, or provide a specific formula for computing such terms, it simply does not follow that those transactions were thereby entered into outside of the ISO Tariff. Section 2.3.5.1.5 explicitly provides the ISO and suppliers the discretion to set these terms on a transaction-by-transaction basis, and the ISO and suppliers did so *pursuant to the ISO Tariff*.[7] Moreover, because the ISO only procures energy on behalf of its Scheduling Coordinators, the ISO's authority to make payment, and the timelines for making payment, are controlled by the settlement procedures set forth in Section 11 of the ISO Tariff, because those are the procedures under which the Scheduling Coordinators have agreed to transact.

[7] LADWP also points to the Commission's decision to exempt from refund transactions made pursuant to Section 202(c) of the Federal Power Act, reasoning that those transactions were also made pursuant to Section 2.3.5.1.5 of the ISO Tariff, but that the ISO Tariff does not govern the terms and conditions of those sales. The premise of this argument is flawed because 202(c) transactions were not made pursuant to the contracting authority set forth in Section 2.3.5.1.5 of the ISO Tariff. Instead, they were made pursuant to a series of orders issued by the Secretary of Energy which gave the ISO specific authority to request and obtain energy under certain parameters.

III. CONCLUSION

For the reasons stated above, the ISO respectfully requests that the Commission deny the relief sought by Sempra and LADWP in their respective pleadings filed in this proceeding on May 24, 2004.

Respectfully submitted,

/s/ Michael Kunselman

Charles F. Robinson
General Counsel
Gene L. Waas
Regulatory Counsel

The California Independent
System Operator Corporation
151 Blue Ravine Road
Folsom, CA 95630
Tel: (916) 608-7049

J. Phillip Jordan
Michael Kunselman

Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
Tel: (202) 424-7500

Dated: June 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list for the captioned proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Folsom, CA, on this 8th day of June, 2004.

/s/ Gene L. Waas
Gene L. Waas